

JAPAN – APPLES¹

(DS245)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>SPS Arts 2.2, 5.7 and 5.1 DSU Art. 11</i>	Establishment of Panel	<i>3 June 2002</i>
			Circulation of Panel Report	<i>15 July 2003</i>
Respondent	<i>Japan</i>		Circulation of AB Report	<i>26 November 2003</i>
			Adoption	<i>10 December 2003</i>

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Certain Japanese measures restricting imports of apples on the basis of concerns about the risk of transmission of fire blight bacterium.
- Product at issue: Apples from the United States.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- SPS Art. 2.2 (scientific evidence): The Appellate Body upheld the Panel's finding that the measure was maintained "without sufficient scientific evidence" inconsistently with Art. 2.2, as there was a clear disproportion (and thus no rational or objective relationship) between Japan's measure and the "negligible risk" identified on the basis of the scientific evidence.
- SPS Art. 5.7 (provisional measure): The Appellate Body upheld the Panel's finding that the measure was not a provisional measure justified within the meaning of Art. 5.7, as the measure was not imposed in respect of a situation "where relevant scientific evidence is insufficient". Having noted that the pertinent question under Art. 5.7 is whether the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A of the SPS Agreement, the Appellate Body found that in light of the Panel's finding of a large quantity of high-quality scientific evidence describing the risk of transmission of fire blight through apple fruit, there was "the body of available scientific evidence" in this case that would allow "the evaluation of the likelihood of entry, establishment or spread" of fire blight in Japan through apples exported from the United States.
- SPS Art. 5.1 (risk assessment): The Appellate Body upheld the Panel's finding that the measure was not based on a risk assessment as required under Art. 5.1 because the pest risk analysis relied on by Japan (i.e. "1999 PRA") failed to evaluate (i) the likelihood of entry, establishment or spread of fire blight specifically through apple fruit; and (ii) the likelihood of entry "according to the SPS measures that might be applied". In this regard, the Appellate Body noted that the obligation to conduct an assessment of "risk" under Article 5.1 is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of the SPS measure, rather an evaluation of the risk must connect the possibility of adverse effects with an antecedent or cause (i.e. in this case, transmission of fire blight "through apple fruit"). Also, the Appellate Body upheld the Panel's view that the definition of "risk assessment" requires that the evaluation of the entry, establishment or spread of a disease be conducted according to the sanitary or phytosanitary measures which might be applied, not merely measures which are being currently applied.

¹ *Japan – Measures Affecting the Importation of Apples*

² Other measures addressed in this case: burden of proof, objective assessment under DSU Art. 11; sufficiency of notice of appeal (Working Procedures for Appellate Review, Rule 20(2)(d)); terms of reference; admissibility of evidence; consultation with scientific experts (SPS Art. 11.2 and DSU Art. 13.1).

JAPAN – APPLES (ARTICLE 21.5)¹
(DS245)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	SPS Arts. 2 and 5	Referred to the Original Panel	30 July 2004
			Circulation of Panel Report	23 June 2005
Respondent	Japan	DSU Art. 11	Circulation of AB Report	NA
			Adoption	20 July 2005

1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- Japan's revised restrictions on imports of apples from the United States with the following modifications: (i) reduction of annual inspections from three to one; (ii) reduction of the buffer zone from 500 to ten meters; and (iii) elimination of the requirement that crates be disinfected.

2. SUMMARY OF KEY PANEL FINDINGS

- SPS Art. 2.2: Regarding the US claim that the Japanese compliance measures were inconsistent with the rulings and recommendations of the DSB because they were not based on "sufficient" scientific evidence, the Panel found that "sufficiency" is a "relational concept between two elements: the scientific evidence and the measure at issue" and found that for each measure at issue, except the certification requirement that fruits were free from fire blight, was not supported by "sufficient scientific evidence".
- SPS Art. 5.1: The Panel found that in "the absence of any scientific evidence of a fire blight-risk posed by mature, symptomless apple fruit, any risk analysis which concludes otherwise would not 'take into account available scientific evidence,' and would not meet the requirements for a risk assessment under Article 5.1". Having reviewed the scientific studies in this regard, including the comments by the scientific experts, the Panel held that the new studies relied upon by Japan did not support the findings in the 2004 Pest Risk Analysis (PRA) that "mature apples could be latently infected". Consequently the Panel held that "the 2004 PRA is not an assessment, as appropriate to the circumstances, of the risks to plant life or health, within the meaning of Article 5.1 of the SPS Agreement".
- SPS Art. 5.6: The Panel concluded that Japan acted inconsistently with Art. 5.6 because the alleged compliance measure was "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection" within the meaning of Art. 5.6. The Panel found that if the United States "only exports mature, symptomless apples, the alternative measure proposed by the United States [i.e. the requirement that apples imported into Japan be mature and symptomless] meets the requirements of Article 5.6 as a substitute to Japan's current measure". In this regard, the Panel concluded that this alternative measure: (i) was reasonably available taking into account technical and economic feasibility; (ii) achieved Japan's appropriate level of sanitary or phytosanitary protection; and (iii) was significantly less restrictive to trade than the SPS measure at issue, and thus satisfied the three-pronged test confirmed by the Appellate Body in *Australia – Salmon*.

3. OTHER ISSUES²

- DSU Art. 11: After the establishment of the Panel, Japan adopted the Operational Criteria (OC) which were designed to function as guidelines for the compliance measures. As to the US request for a preliminary ruling that the OC was not a "measure taken to comply" on the grounds that the measure (i) was adopted after the establishment of the Panel; and (ii) was not vested with legal binding force, the Panel rejected the US arguments and held that it was obliged under DSU Art. 11 to objectively examine the facts before it: "[a]s soon as the [OC] were brought to the attention of the United States and the Panel, they became an official statement of how Japan intended to implement its legislation on fire blight on which the United States and the Panel could rely".

¹ *Japan – Apples Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States*
² Other issues addressed: SPS Arts. 2.2 and 5.2, GATT Art. XI; and AA Art. 4.2.